No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, *et al.*,
Petitioners,

v.

PUTNAM FUNDS TRUST, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF LAW PROFESSORS ARTHUR R. MILLER, E. FARISH PERCY, MICHAEL E. SOLIMINE, AND JILL E. FISCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Professor Arthur. R. Miller is the Bruce Bromley Professor of Law at the Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure: Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (West 2005); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (Thomson West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Assistant Professor E. Farish Percy joined the faculty at the University of Mississippi School of Law in 2001 and teaches Civil Procedure, Torts, and Insurance. Much of her recent research has been devoted to the issue of federal court jurisdiction. She has recently written two law journal articles proposing a framework to be used by federal district courts when evaluating allegations of fraudulent joinder in cases where removal is based on federal diversity jurisdiction.

Professor Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has been a member of the faculty since 1987. He teaches and has written numerous articles on

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[1]The parties have consented to the filing of this brief. Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

civil procedure and federal courts. He also written extensively on federal appellate practice, and is the co-author of the new edition of a leading appellate practice case book: Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Appellate Practice and Procedure: Cases and Materials* (Thomson West 2d ed. 2005).

Professor Jill E. Fisch is the Alpin J. Cameron Professor of Law at Fordham Law School, where she has been a member of the faculty since 1989. She teaches Corporate Law, Securities Regulation, and Federal Courts. Professor Fisch's scholarship includes work on corporate law, securities regulation, and federal courts and has appeared in a variety of publications including the Harvard Law Review, the Yale Law Journal, the Columbia Law Review, and the Cornell Law Review.

Having devoted their careers to teaching and writing about the federal courts and working for their improved administration, amici have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF ARGUMENT

Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court had consistently held that 28 U.S.C. § 1447(d) and its predecessors forbade appeal of a district court's remand order under *any* circumstances. *See United States v. Rice*, 327 U.S. 742, 749 (1946). This time-honored bar to appellate review of remand orders rested on Congress's legislative "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to

which the cause is removed." *Id.* at 751. In an apparent effort to address an injustice in a particular case, *Thermtron* for the first time created an exception to § 1447(d)'s categorical rule, holding despite the statute's plain language that when a district court's decision to remand is based on "grounds not provided by [] statute," the court's order is subject to appellate review. *Thermtron*, 423 U.S. at 349.

Chief Justice Rehnquist, then Associate Justice, in his dissent in *Thermtron* called the Court's new exception "both unworkable and portentous of the significant impairment of Congress's carefully worked out scheme." *Id.* at 357 (Rehnquist, J., dissenting). Chief Justice Rehnquist's words have proved prophetic. In the years since *Thermtron*, the lower courts have struggled with the limits of the exception, creating several circuit splits and eviscerating Congress's clear statutory rule. *See* 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 1998). In practice, *Thermtron* has allowed defendants to undermine the purpose of § 1447(d) by subjecting plaintiffs in state court actions to unjustified delays during the appeal of a district court's remand order.

Because it is difficult or impossible to distinguish a remand order that is not authorized by statute and is thus subject to appeal under *Thermtron* from a remand order that is merely erroneous and thus unappealable under § 1447(d), the Court should take this opportunity to limit *Thermtron* to its facts and thereby end the confusion in the lower courts. In any case, the district court's decision below specifically purported to be based on a lack of subject matter jurisdiction and is therefore barred from appellate review by § 1447(d).

ARGUMENT

I. The *Thermtron* Exception Is Not Supported by the Text of § 1447(d) and Should Not Be Extended.

It is difficult to imagine how Congress could more clearly have expressed an intent to bar all appellate review of remand orders than it did in 28 U.S.C. § 1447(d): "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Prior to *Thermtron*, the Court faithfully enforced Congress's explicit statutory bar "regardless of the reasons underlying the [district court's] decision to remand." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 840 (3d Cir. 1991). Indeed, since the first predecessor to § 1447(d) was enacted in 1887, the Court had consistently held that *no* appeal of remand orders was permissible under the statute. *See Rice*, 327 U.S. at 749.

Thermtron for the first time created an exception to this categorical rule, holding that the basis of the district court's decision to remand in that case—its crowded dockets—was one that the court "had no authority to consider." *Thermtron*, 423 U.S. at 351. The Court held that § 1447(d) "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). Thus, courts of appeals had jurisdiction over a remand order as long as the remand was not based on either a defect in removal procedure or a lack of subject-matter jurisdiction—the two grounds for remand recognized by § 1447(c). *Id.* at 127-28.[2]

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[2]In 1996, Congress amended § 1447(c) to read:

(continued...)

Given the unambiguous statutory language of § 1447(d), however, the Court's resort in *Thermtron* to a canon of statutory construction for its interpretation of the statute is, with all respect, unconvincing. Section 1447(d) states simply and plainly that *any* order remanding a case is unreviewable. As the Court noted in *Rice* when construing § 1447(d)'s predecessor, "[s]tatutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." *Rice*, 327 U.S. at 752-53. The plain meaning of § 1447(d) does not lead to results that are "absurd or glaringly unjust," *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quotation omitted), and is therefore

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[2](.. continued)

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). By changing the statute to cover remands based on both defects of subject matter jurisdiction and defects "other than lack of subject matter jurisdiction," the statute's new language appears to cover *all* remands, and *Thermtron*'s distinction between those remands that are authorized by § 1447(c) and those that are not seems no longer to have any basis in the language of the statute. The legislative history of the amendment, however, indicates that it was not intended to effect a substantive change. *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535, 561-69 (1999) (examining the legislative history).

controlling. Yet, the Court's decision in *Thermtron* discounted the clear statutory language, holding in effect "that § 1447(d) does not mean what it says." *In re Amoco Petroleum Additives Co* , 964 F.2d 706, 708 (7th Cir. 1992).

The decision in *Thermtron* also discounted the Court's uninterrupted history of interpreting § 1447(d)'s predecessor statutes to prohibit *all* appellate review of remand orders. *Rice*, 327 U.S. at 752 (noting the "universality of the practice" of denying review of remand orders). Congress is presumed to have been aware of this unanimous judicial authority when it enacted the present version of § 1447(d). *See Edelman v. Lynchburg College*, 535 U.S. 106, 116-17 (2002) (noting that Congress is presumed to know of and incorporate settled judicial doctrines when enacting and amending statutes). In those instances where Congress has intended to create an exception to the general rule of non-appealability, it has not hesitated to provide the necessary statutory language. For example, § 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title *shall be reviewable* by appeal or otherwise" (emphasis added). Congress has created a total of four such exceptions to § 1447(d).[3]

[3]Another example is the recently enacted Class Action Fairness Act of 2005, which provides that, "*notwithstanding section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1) (emphasis added). Two other exceptions allow the United States to appeal remands in cases involving Native American tribes and the Federal Deposit Insurance Corporation and the Resolution Trust Corporation to appeal remands in cases where they are parties. Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.

(continued)

Since *Thermtron* was decided, it has faced substantial academic criticism on the ground that it ignored Congress's clearly expressed intent to bar appellate review of remand orders,[4] and this Court has generally rejected attempts to further expand the scope of the exception. *See Things Remembered*, 516 U.S. at 129. Nevertheless, as explained in the following section, the Court's decision in *Thermtron* to allow an appeal under the facts of that particular case has led to a widespread disregard of the statute's plain meaning in the lower courts. To prevent any additional erosion of § 1447(d)'s clearly expressed rule, the Court should limit *Thermtron* to the particular facts of that case, leaving any further modifications of § 1447(d) to Congress. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003) ("It is not our place as jurists to supply that which is omitted by the legislature.").

Developments before this Court in another area of appellate jurisdiction parallel the approach that amici urge here with respect to *Thermtron*. The principal basis for federal appellate jurisdiction is 28 U.S.C. § 1291, under which litigants may appeal only from "final decisions" of the district courts. In general, § 1291 means what is says: A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988) (quotation omitted). Under

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[3](...continued)
J. 83, 104-08 (1994).

[4]*See, e.g.*, Hrdlick, *supra* note 2; Thomas F. Lamprecht, Note, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act*, 50 Vill. L. Rev. 305 (2005); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993); Wasserman, *supra* note 3; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740, at 525-27.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), § 1291 also includes a narrow category of orders that do not end the entire litigation, but finally decide an important issue that is wholly collateral to the merits of the litigation, review of which is necessary to prevent irreparable harm. Some fifteen years later, however, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court took *Cohen* well beyond its original narrow purpose and allowed an interlocutory appeal simply where the district court had dismissed one set of claims on their merits but not another. The Court acknowledged that appellate review in that case "could be called 'piecemeal,'" but justified erosion of the "final decision" rule based on the Court's own view of "the inconvenience and cost" of trying the case prior to appeal, and its concern that delay in resolving the claims could work "a great injustice" to the plaintiffs. *Id.* at 153. In dissent, Justice Harlan noted that these reasons "furnishe[d] no excuse for avoidance of the finality rule," and sounded an alarm, not unlike the alarm sounded by Chief Justice Rehnquist in *Thermtron*, that such arguments could support review in many interlocutory appeals. *Id.* at 167-70 (Harlan, J., dissenting).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court put on the brakes. After holding that a district court order denying class certification is not an appealable collateral order under *Cohen*, the Court rejected the plaintiffs' reliance on *Gillespie*, effectively ending its relevance as a § 1291 precedent. "If *Gillespie* were extended beyond the unique facts of that case," Justice Stevens explained, "§ 1291 would be stripped of all significance." *Id.* at 477 n.30. So, too, here, if *Thermtron* were allowed to expand beyond its highly unusual circumstances, the strict no-appeal policy expressed by Congress in § 1447(d) would be seriously eroded, if not destroyed entirely.

In this case, the court of appeals found a new implicit exception to § 1447(d) for cases remanded pursuant to SLUSA's remand provision. Congress, however, is aware of the presumption that § 1447(d)'s bar to appellate review applies "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes*, as well." *Things Remembered*, 516 U.S. at 128 (quotation omitted). "Absent a clear statutory command to the contrary," Congress is presumed to have intended § 1447(d)'s bar to apply. *Id.* The remand provision in SLUSA does not contain a "clear statutory command" demonstrating a congressional intent to authorize review of SLUSA remand orders. 15 U.S.C. § 77p(d)(4); *see Spielman*, 332 F.3d at 127 ("Conspicuously absent from SLUSA is any express language suggesting that it operates to override the appealability exclusion of Section 1447(d)."). In contrast to SLUSA's statutory silence, Congress in the Class Action Fairness Act of 2005 specifically provided for *permissive* appellate review "*notwithstanding section 1447(d)*." *See supra* note 3. Absent such an unambiguous command, this Court should reject the Seventh Circuit's attempt to carve out a new exception to § 1447(d)'s rule.

II. *Thermtron*'s Holding Undermines the Purpose of § 1447(d) by Encouraging Appeal as a Delaying Tactic.

The bar to appellate review of remand orders arises from Congress's "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751. Congress understood that district courts are not infallible and that some remand orders—presumably a small minority—would be erroneously granted. Nevertheless, a defendant whose case is

mistakenly remanded to state court can still obtain a fair trial in that forum, and, in Congress's judgment, any degree of prejudice resulting from denying defendants their forum of choice is outweighed by the importance of avoiding prolonged delays in federal court. *See Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting). By providing removal to the district court but disallowing appeals, Congress struck a balance between the desirability of allowing access to a federal forum and the significant costs of delay on appeal. *Id.* at 354-55.

The Court in *Thermtron* apparently expected the exception it created to § 1447(d)'s previously firm rule to be a narrow one. After *Thermtron*, the particular basis for the district court's remand in that case—its clogged dockets—cannot be expected to be invoked explicitly as a ground for remand by district courts. *Thermtron*, however, has not been limited to that ground. Courts of appeals have often been reluctant to let pass a district court's perceived mistakes and, as in this case, have stretched to find the authority to correct them. Indeed, commentators have noted that "[a]t virtually every opportunity, many of the lower courts chose to expand *Thermtron* and create additional exceptions to Section 1447(d)." Solimine, *supra* note 4, at 332; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740 (documenting the long line of lower court cases struggling with the application of *Thermtron* and expanding its scope); Lamprecht, *supra* note 4, at 312 (noting that courts have "whittled away at [§ 1447(d)'s] seemingly decisive language"); Wasserman, *supra* note 3, at 119. The result has been a "gradual evisceration" of the § 1447(d) bar. Lamprecht, *supra* note 4, at 311; *see also* Solimine, *supra*, at 288-89 (noting that post-*Thermtron* cases in the lower courts "permit federal appellate review of district

court remand orders in a wide variety of circumstances.").[5]

The rule set forth in *Thermtron* does not give lower courts sufficient guidance about where to draw the line between what is appealable and what is not. *Thermtron* itself held that the district court's remand order was appealable when granted on "grounds not provided by [] statute." *Thermtron*, 423 U.S. at 349. But, as Chief Justice Rehnquist pointed out in his *Thermtron* dissent, a district court can be said to be acting outside its statutory authority *any* time its grant of remand is held to be erroneous. *Id.* at 356 (Rehnquist, J., dissenting). Although the *Thermtron* majority cautioned that a remand premised on grounds authorized by statute would be unreviewable "whether erroneous or not," *id.* at 343, lower courts have had a difficult time applying this distinction. *See Amoco*, 964 F.2d at 708-09. For example, district courts sometimes remand on purportedly jurisdictional grounds, but either do not explain the basis for their lack of jurisdiction or provide an explanation that is not jurisdictional in nature. *See Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting). This problem has led to a circuit split on the question whether the district court's mere use of the word "jurisdiction" is sufficient to deny appellate review, even when it is apparent that the court's ruling was actually on a non-jurisdictional and impermissible ground.[6]

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[5]A recent Westlaw search identified 250 cases in the previous ten years in which courts of appeals had to construe and apply § 1447(d). Among the reported cases, the majority of cases allowed review; even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.

[6]*Compare Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (holding that a court of appeals may review a remand order "only if the district court clearly and affirmatively

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Unfortunately, the courts of appeals' allowance of appellate review in *some* remand cases effectively allows appellate review in *all* remand cases. Defendants in state court actions can always argue that appellate review of the district court's remand decision should be available under an exception to § 1447(d). These appeals do not need to be meritorious to achieve the purpose of delay; it was, after all, primarily a concern with the possibility of the delay resulting from *unmeritorious* removals that caused Congress to enact the appeals bar in the first place and there is thus no reason to think that litigants who engage in such removals will not press their positions on appeal. The median length of an appeal in the federal courts of appeals is 11.4 months.[7] By appealing a

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[6](. continued)
relies on a non-section 1447(c) basis") (quotation omitted), *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (holding that if there is any ambiguity about whether the district judge felt that a remand was compelled, the court of appeals must "determine by independent review of the record" what the real basis for remand was). The Seventh Circuit in this case adopted the latter approach. Under the former approach, which has also been adopted in slightly modified form by the Third and Tenth Circuits, the district court's remand order in this case would have been unreviewable. *See Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) (barring review as long as the district court's finding of no subject matter jurisdiction was made in good faith).

[7]Administrative Office of the United States Courts, 2004 Annual Report of the Director, Table B-4, *available at* http://www.uscourts.gov/judbus2004/appendices/b4.pdf (reporting the median time interval in all civil cases, other than prison petitions, between filing the notice of appeal and final disposition). Of course, if the defendant petitions for a writ of certiorari, the length of the appeal is further increased. This case, for example, first reached the

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district court's remand order and arguing that an exception to the "no appeal" rule applies, state court defendants compound the initial delay caused by removal by achieving an additional delay on appeal. *Amoco*, 964 F.2d at 708 ("Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principal justification for § 1447(d)."); *see* Solimine, *supra* note 4, at 304-05 ("The bar to review does little good if the putative reviewing authority is forced to ask in every case if the remand order is without the bounds of 'correctness.'").

In those cases in which Congress considers the availability of appellate review to be more important than the delay resulting from that review, it has created specific exceptions to the reach of § 1447(d). *See* Wasserman, *supra* note 3, at 105-07; *supra* at 6 & note 3. Section 1447(d)'s exception for appeals of remand orders in civil rights cases, for example, was based on Congress's "perception that remands of civil rights cases were particularly injurious to defendants in those cases, and that appellate exposition of Section 1443 was necessary.'" Solimine, *supra* note 4, at 293. Thus, "Congress has demonstrated its ability to protect against judicial abuses of removal rights when it thought it necessary to do so." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting).

The Seventh Circuit's decision below is not unusual in its use of the *Thermtron* exception to second-guess the policy judgment of Congress. The court stressed the importance of "accurate and consistent implementation" of SLUSA and downplayed the potential for delay, noting that expedited review would be available in appropriate cases. *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004). But

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[7](. .continued)
Seventh Circuit in March 2004.

the potential for inaccurate and inconsistent application of federal law is *always* a cost of denying appellate review in removal cases. This was a cost Congress was willing to pay in balancing the desirability of granting access to a federal forum against the resulting cost of delay. "It is not for this Court to strike that balance anew." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting).

III. The District Court's Remand Order in this Case Falls Well Outside the Scope of the *Thermtron* Exception.

The Seventh Circuit in this case concluded it had jurisdiction to review the district court's order remanding the case for lack of subject matter jurisdiction because it disagreed with the district court's characterization of the remand. Not only is the Seventh Circuit's decision wrong as a matter of statutory interpretation, it also constitutes an impermissible second-guessing of the district court's remand order.

A. The District Court Dismissed on Grounds of Subject Matter Jurisdiction.

First, as a matter of statutory construction, the Seventh Circuit was wrong to conclude that the district court's dismissal was not jurisdictional in nature. SLUSA authorizes the removal of securities cases only in certain defined circumstances:

> Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. § 77p(c) (emphasis added). The subset of cases "as set forth in subsection (b)" consists of those "covered class actions" that SLUSA preempts. Subsection (b) provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Id. § 77p(b).

Subsection (b) thus "sets forth" a defined set of covered class actions and preempts them. Subsection (c), in turn, makes these preempted class actions removable. Because a district court's removal jurisdiction under SLUSA extends only to those covered class actions that SLUSA preempts, a district court's remand of a case to state court on the grounds that SLUSA does not preempt the case is, by definition, a remand for lack of subject matter jurisdiction. "[P]reemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring). For this reason, the Second, Ninth, and Eleventh Circuits have held that a remand under SLUSA is jurisdictional in nature. *See Williams v. AFT Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004); *Spielman*, 332 F.3d at 125; *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002).

Another way to think of the confluence of subject matter jurisdiction and preemption that triggers non-reviewability under § 1447(d) is to appreciate that SLUSA embodies a species of federal subject matter jurisdiction that federal courts have recognized under the "complete preemption" doctrine.

Spielman, 332 F.3d at 123 ("SLUSA was intended to completely preempt the field of *certain types* of securities class actions"); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002) ("SLUSA provides for . . . complete preemption."). When a federal statute completely preempts a state-law cause of action, a plaintiff's claim arises under federal law and is removable even if pleaded solely in terms of state law. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). On the other hand, when, in a particular case, the district court finds that the plaintiff's claim is not completely preempted by SLUSA, that is, that the plaintiff's claim arises under state law, its ruling constitutes a finding that the court does *not* have subject matter jurisdiction. Not surprisingly, therefore, all circuits that have examined the question, other than the Seventh Circuit in its decision below, have held that a remand based on a lack of complete preemption is insulated from review under § 1447(d).[8]

B. The Seventh Circuit Impermissibly Second-Guessed the District Court's Remand Decision.

As noted earlier, the district court's remand order in *Thermtron* was granted solely on the ground that the court's docket was too crowded to permit a speedy resolution of the case. *Thermtron*, 423 U.S. at 344. Such a justification was

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[8] *Spielman*, 332 F.3d at 125; *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 n.7 (3d Cir. 1995); *Nutter v. Monogahela Power Co.*, 4 F.3d 319, 321-22 (4th Cir. 1993); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1345-46 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986).

without legal basis, and "plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether this cause was removed improvidently and without jurisdiction within the meaning of the statute." *Id.* Because the district court in *Thermtron* did not even purport to dismiss the case based on subject matter jurisdiction or a defect in removal procedure, this Court had no need to second-guess the claimed basis of the district court's decision. On the contrary, the Court stressed that a district court's decision to remand for lack of subject matter jurisdiction was unreviewable on appeal "*whether erroneous or not.*" *Id.* at 343 (emphasis added); *see also Amoco*, 964 F.2d at 708 ("[E]ven an obviously erroneous invocation of § 1447(c) is untouchable.").

To rationalize its ruling, the court below disassociated SLUSA's subsection (c) analysis regarding removal from the subsection (b) requirements regarding complete preemption, holding that only the requirements of subsection (c) were jurisdictional in nature. Based on this reading of SLUSA, the court of appeals concluded that because the district court's ruling concerned preemption under subsection (b), it had appellate jurisdiction to review the district court's remand order even though the district court explicitly stated that its remand was based on lack of subject matter jurisdiction. As explained above, that analysis does not square with the statute's text. But even if this Court were to agree with the Seventh Circuit's interpretation of SLUSA, it was not *unreasonable* for the district court to believe that subsection (c)'s phrase "as set forth in subsection (b)" incorporated subsection (b)'s requirements into the criteria for removal. This interpretation of the statute, after all, has been accepted by all the courts of appeals to consider the question other than the Seventh Circuit.

If a court of appeals can second-guess a district court's purported jurisdictional dismissal here, where there are strong textual arguments in support of its position and no contrary authority in any court of appeals, many, perhaps most, district court remands could also be second-guessed on appeal. As Chief Justice Rehnquist feared, the purportedly narrow exception created in *Thermtron* would have begun to swallow § 1447(d)'s "no appeal" rule. The Court should restore the statute to its textual foundation, leaving to Congress the decision to chart a new course on the appealability of remand orders.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be vacated and remanded with instructions that the case be further remanded to the state court in which it was filed.

Respectfully submitted,

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